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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/954,508

09/14/2001

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03/18/2009

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EXAMINER

NGUYEN, THANH T

ART UNIT

PAPER NUMBER

2444

MAIL DATE

DELIVERY MODE

03/18/2009

PAPER

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* IVAN A. TODOROV, LOUIS D. ROSS,  
MICHAEL HADRICH, and RAINER HESSMER

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Appeal 2008-6171  
Application 09/954,508<sup>1</sup>  
Technology Center 2400

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Decided:<sup>2</sup> March 18, 2009

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Before JOHN C. MARTIN, JEAN R. HOMERE, and  
CAROLYN D. THOMAS, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* MARTIN.

Opinion dissenting-in-part filed by *Administrative Patent Judge* HOMERE.

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<sup>1</sup> Filed September 14, 2001

<sup>2</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

Appeal 2008-6171  
Application 09/954,508

MARTIN, *Administrative Patent Judge*.

DECISION ON APPEAL  
STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-50, which are all of the pending claims.

An oral hearing was held on February 11, 2009.<sup>3</sup>

We have jurisdiction under 35 U.S.C. § 6(b). We Affirm-In-Part.

*A. Appellants' invention*

Appellants' invention is an extensible architecture for a data access server (Specification 3:29) in a process control system (*id.* at 3:14-15) that supports multiple client data exchange protocols (*id.* at 1, title).

Appellants' Figures 2 and 3 are reproduced below.

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<sup>3</sup> Arguments made for the first time at an oral hearing are generally entitled to no consideration. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2008) ("Any arguments or authorities not included in the brief or a reply brief filed pursuant to § 41.41 will be refused consideration by the Board, unless good cause is shown.").

FIG. 2

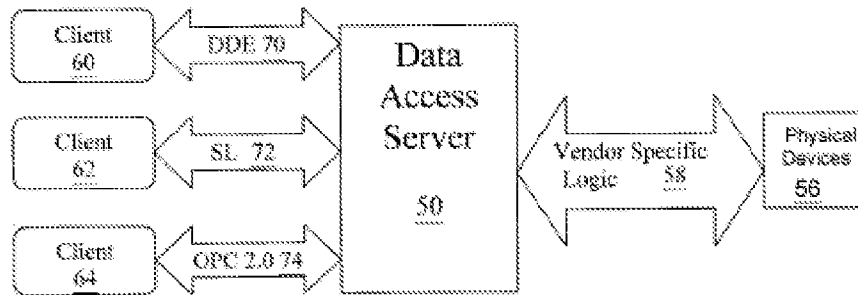


FIG. 3

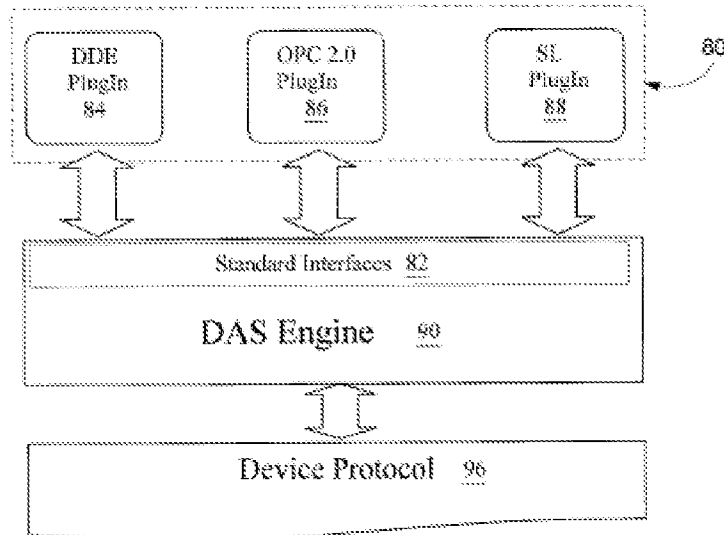


Figure 2 is a schematic drawing summarizing the general interface arrangement for an exemplary data access server embodying Appellants' invention. *Id.* at 6:9-10. Figure 3 is a schematic drawing depicting the software architecture of an exemplary data access server (labeled 50 in Fig. 2). *Id.* at 6:11-12.

Although boxes 60, 62, and 64 are each labeled “client” and described as representing clients at page 10, lines 12-17, each client is actually a different “client application,” as explained at page 11, lines 6-10.

The client data exchange protocol component 80 comprises an “extensible set of client data exchange protocol modules” (e.g., plugins 84, 86 and 88) that support data exchange protocol-specific interaction between the DAS 50 and a set of client applications that communicate with DAS 50 according to particular data exchange protocols, such as DDE, OPC 2.0, and SuiteLink (SL). *Id.* at 11:6-11. Standard interfaces 82 (Fig. 9) comprise a superset of all interface operations potentially needed by any one of the plugins to enable the DAS engine 90 to respond to data requests received by the plugins from client applications executing at the supervisory control level of the process control system. *Id.* at 11:16-19.

The device protocol component 96 is responsible for delivering data received from data sources, such as field devices and control processors, to DAS engine 90. *Id.* at 10:27-29. DAS engine 90 logically organizes data received from devices to provide a standardized/generic data access interface to the plugins (e.g., DDE plugin 84) through the set of standard interfaces 82. *Id.* at 14:1-3. Data activation, or the actual retrieval of stored data in response to a request specified by a particular client protocol plugin, is performed in a standardized manner (regardless of the requesting client's protocol) at DAS engine 90. *Id.* at 14:8-10.

In an embodiment of the invention, the client protocol-specific plugins receive a data request for an item of interest according to a particular data exchange protocol and convert the request into one or more calls to particular ones of the operations associated with the set of standard interfaces 82. *Id.* at 14:10-13. The calls are handled by core data access functions within DAS engine 90. *Id.* at 14:13-14.

*B. The claims*

The independent claims before us are claims 1, 22, and 44, of which claim 1 reads:

1. A process data access server enabling client applications incorporating potentially multiple differing data exchange protocols to access process data stored at potentially many different locations in a process control system, the process data access server comprising:
  - a device protocol interface facilitating accessing process data storage locations within the process control system;
  - a set of client data exchange protocol modules enabling client applications to request access to process data storage locations via the process data access server according to particular client data exchange protocols supported by the set of client data exchange protocol modules; and
  - a data access server engine for executing process data access requests, received by the process data access server via the set of client data exchange protocol modules, by accessing, via the device protocol interface, data storage locations corresponding to the process data access requests, and wherein the data access server engine includes a client application data

exchange protocol abstraction layer comprising a set of operations callable by ones of the set of client data exchange protocol modules in response to receipt by the set of client data exchange protocol modules of process data access requests.

Claims App., Br. 12.

*C. The references and rejection*

The Examiner relies on the following references:

Dorrance et al. (Dorrance)	US 6,430,598 B1	Aug. 6, 2002 (filed Jan. 29, 1999)
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Lim et al. (Lim)	US 6,718,550 B1	Apr. 6, 2004 (filed Jun. 26, 1996)
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Claims 1-50 stand rejected under 35 U.S.C. § 103(a) for obviousness over Dorrance in view of Lim.

Appellants separately argue the following groups of claims:

- (1) Claims 1, 10-12, 22, and 32-34;
- (2) Claims 2-5, 30, and 45-48;
- (3) Claims 6, 31, and 49;
- (4) Claim 7;
- (5) Claims 8, 25, and 50;
- (6) Claim 9;
- (7) Claims 13-21, 23, 24, 26-29, and 35-43; and
- (8) Claim 44.

Br. 6, 9-10.

## THE ISSUE

Generally speaking, the issue is whether Appellants have shown reversible error by the Examiner in maintaining the rejection. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (“On appeal to the Board, an applicant can overcome a rejection by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.”) (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

The principal issues are whether Appellants have shown that the Examiner erred in finding that Dorrance discloses various claim limitations, including a “process data access server” (claim 1), “a set of client data exchange protocol modules” (claim 1), a “protocol abstraction layer” (claim 1) and “plugins” (e.g., claim 2).

## PRINCIPLES OF LAW

“[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). A rejection under 35 U.S.C. § 103(a) must be based on the following factual determinations: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) any objective indicia of non-obviousness. *DyStar Textilfarben GmbH &*



*Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1360 (Fed. Cir. 2006) (citing *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966)).

## ANALYSIS

### *A. The Examiner's reliance on Lim*

The Examiner found that Dorrance satisfies all of the limitations of claim 1 except that “Dorrance does not explicitly teach a set of client[s].”

Answer 4.<sup>4</sup> The Examiner then stated:

Lim[] teaches a set of client (see col.2, lines 43-51, and col.23, lines 20-40). It would have been obvious to one of ordinary skill in the art at the time of the invention was made to implement the teachings of Lim into the computer system of Dorrance to have a set of client because it would have provided specific functions that can improve and reduce the performance of object in distributed object system.

Answer 4. Although the above-quoted passage refers to “the teachings of Lim,” the only teaching in Lim that is specifically identified by the Examiner in the Answer is using a server to serve a set of clients.

However, counsel for Appellants conceded during oral argument that the Examiner's reliance on Lim for a teaching of plural clients is unnecessary because claim 1 recites “client applications,” a term that is broad enough to read on a single client having plural applications.

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<sup>4</sup> Thus, the only modification of Dorrance proposed in the rejection is to add a set a clients.

Furthermore, although not required by claim 1, it is clear that Dorrance's email server handles email requests from plural clients. *See* Dorrance, col. 5, ll. 4-6) (“[C]onverter 65 converts data into a protocol utilized by a client 60 before transmitting data to the client 60.”). Appellants do not contend otherwise.

The Examiner's reliance on Lim for a teaching of plural clients is also unnecessary with respect to independent claims 22 and 44, neither of which requires a plurality of clients.

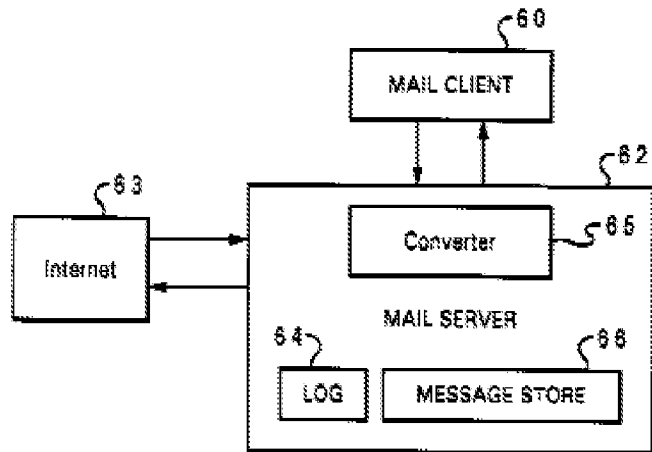
Consequently, we need not address Appellants' traversal of the stated basis for combining the teachings of Dorrance and Lim. Br. 7-8.

*B. Dorrance*

Dorrance discloses a method and system for an electronic mail system to reliably delete messages from a server independently of a protocol utilized by the client/server data communication system for transmitting data, where at least one protocol utilized by a client does not provide an explicit delete signal. Dorrance, col. 1, ll. 11-16.

For example, a single client may include one piece of software supported by POP, which employs a transmission reply signal that may be an explicit delete signal, and another piece of software supported by OFX, which does not employ an explicit delete signal. *Id.*, col. 2, ll. 6-21.

Figure 3 of Dorrance is reproduced below.



*Fig. 3*

Figure 3 depicts a block diagram of an electronic mail client/server architecture wherein a mail client 60 interacts with a mail server 62, which further includes a converter 65, a log manager 64 and a message store 66. *Id.*, col. 4, ll. 59-63.

Converter 65 translates the request from the protocol utilized by the client into the standard server protocol (*id.*, col. 6, l. 17-19) and also converts data into a protocol utilized by a client 60 before transmitting data to the client 60. *Id.*, col. 5, ll. 2-6. Dorrance does not disclose any details of the software code that performs these conversion functions.

Figure 5 (consisting Figures 5A and 5B) is a high level logic flowchart of the method of deleting messages from a server (*id.*, col. 3, ll. 37-39) whether the client is employing the POP protocol (*id.*, col. 6, l. 63 to col. 7, l. 12) or the OFX protocol (*id.*, col. 7, ll. 26-54).

In this flowchart, block 102 (Fig. 5A) depicts a translation of the request from the client into standard server protocol such as the GOLD protocol. *Id.*, col. 6, ll. 16-17. Since a single client may send message requests in multiple protocols, the protocol utilized by the client is registered in the converter at block 102 when the request is made in order for the converter to properly translate the requested mail at block 110. *Id.*, col. 6, ll. 44-48. Block 110 (Fig. 5A) represents the translation of mail stored in the message store from server protocol into requested client protocol. *Id.*, col. 6, ll. 42-44.

*C. Whether Dorrance discloses a “process data access server”(claim 1)*

Of claims 1, 10-12, 22, and 32-34, which are argued as a group, we select claim 1 for consideration. 37 C.F.R. § 41.37(c)(1)(vii) (2006).

The Examiner, citing Dorrance’s discussion a column 6, lines 6-14 of the Figure 5 flowchart, found that the claim term “process control system” reads on Dorrance’s email system because it performs the process steps depicted in Figure 5. Answer 6. The cited lines read as follows:

As illustrated, the process described in FIG. 5 begins at block 99 and thereafter passes to block 100. A plurality of triggers in the operation of processor unit 12 may trigger the process which begins at block 99. For example, when a server begins to receive requests for messages, the process to initiate request receiving which begins at block 99 may be triggered.

Dorrance, col. 6, ll. 8-14. In the Brief, Appellants initially argued that

the Dorrance patent is directed to an email server and does not constitute a data access server for process control systems. Such control systems comprise a wide variety of discrete and distributed regulatory control systems. However, even given its broadest interpretation, control systems would not appear to include email servers of the type disclosed in Dorrance.

Br. 8. This argument is unpersuasive because the Brief does not demonstrate that the term “data access server,” when given its broadest reasonable interpretation consistent with Appellants’ disclosure, *In re Thrift*, 298 F.3d 1357, 1364 (Fed. Cir. 2002), cannot be read on Dorrance’s email server, such as by identifying a definition of that term in the Specification or in a dictionary that precludes the Examiner’s broad interpretation.

In the Reply Brief, Appellants further argued that Dorrance’s email server

has absolutely no relation to *the claimed “process data access server” which operates in a process control/manufacturing/plant environment to provide access to status/control information associated with a manufacturing/industrial process*. Appellants strongly suggest a careful review of column 6, lines 6-14 that merely identify the initiation of the process of handling a received email server request from a client.

Reply Brief 5 (emphasis modified). This argument is unpersuasive for two reasons. First, the argument is entitled to no consideration because it was not necessitated by a new point in the Answer and thus should have been made in the opening Brief. *See Optivus Technology, Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978, 989 (Fed. Cir. 2006) (argument raised for

the first time in the reply brief that could have been raised in the opening brief is waived); *accord*, *Ex parte Scholl*, No. 2007-3653, slip op. at 18 n.13 (BPAI March 13, 2008) (designated as “Informative Opinion”), <http://www.uspto.gov/web/offices/dcom/bpai/its/fd073653.pdf> (last visited Feb. 26, 2009). Second, the argument is not supported by any evidence that the proffered definition is the broadest reasonable definition consistent with Appellants’ disclosure.

During the oral hearing, counsel for Appellants argued that their interpretation of “data process server” finds support in their Application in the paragraph that corresponds to paragraph [0029] of the corresponding Application Publication 20020116453 A1 (published Aug. 12, 2002). This argument is entitled to no consideration because it does not appear in the Brief or the Reply Brief and Appellants have not shown good cause for not including it therein. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2008) (“Any arguments or authorities not included in the brief or a reply brief filed pursuant to § 41.41 will be refused consideration by the Board, unless good cause is shown.”).

*D. Whether Dorrance discloses or suggests “a set of client data exchange protocol modules” (claim 1)*

The Examiner found that the recited “set of client data exchange protocol modules” reads on Dorrance’s converter 65 (Answer 3-4, 17). That converter translates the request from the protocol utilized by the client into

the standard server protocol (*id.*, col. 6, ll. 17-20) and also converts data into a protocol utilized by a client before transmitting data to the client. *Id.*, col. 5, ll. 2-6. In the example given in Dorrance, converter 65, depending on whether the client's "receive" request is in the POP or OFX protocol, either (a) converts the client's POP protocol to the server standard protocol or (b) converts the client's OFX protocol to the server standard protocol. Consequently, we understand the Examiner to be reading the recited "set of client data exchange protocol modules" on the two parts of the (undisclosed) software code in converter 65 that perform these respective conversions.

Appellants argue that "the fact that the converter 65 handles multiple protocols as well as the complete absence of any description of a modular (or extensible) design for the email server 62 suggests that the converter 65 is an integral component of the email server 62." Br. 6. This argument is unconvincing because Appellants have not demonstrated that the term "modules," when given its broadest reasonable interpretation consistent with Appellants' disclosure, *In re Thrift*, 298 F.3d at 1364, cannot be read on the portions of the (undisclosed) software code that convert the POP and OFX protocols into the server protocol. Although the Specification explains (at 3:18-19) that Appellants' invention employs "a set of user installable/selectable/replaceable program modules such as, for example plugins," Appellants have not identified any definition of "modules" in the Specification. Nor have Appellants explained how "modules" should be interpreted or cited any authority as support for such an interpretation. The

absence of such an explanation is effectively an invitation for the Board to consult Appellants' Specification and the prior art in order to arrive at some unspecified interpretation that is narrower than the Examiner's. This approach to arguing patentability fails to recognize that the burden of defining the invention rests on Appellants rather than on the Examiner or the Board. *In re Morris*, 127 F.3d 1048, 1056 (Fed. Cir. 1997).

*E. Whether Dorrance discloses the "client application data exchange protocol abstraction layer" (claim 1)*

The Examiner reads the "abstraction layer" language on Dorrance as follows:

wherein the data access server engine includes a client application data exchange protocol (Fig.3 server 62 and protocol converter 65) abstraction layer comprising a set of operations callable by ones of data exchange protocol modules in response to receipt by the client data exchange protocol modules of process data access requests (see col.5, lines 35-55, and col.6, lines 7-54).

Final Action 3; Answer 3. Because claim 1 specifies that "a client application data exchange protocol abstraction layer compris[es] a set of operations callable by ones of the set of client data exchange protocol modules," and because the Examiner reads the recited "set of client data exchange protocol modules" on converter 65, we understand the Examiner to be reading the recited "abstraction layer" on the two above-cited passages rather than on converter 65. Of these passages, the more relevant is the



column 6 passage, which refers to blocks 99-116 in the Figure 5A flowchart in describing some of the operations performed by the server in response to a request from a client. Inasmuch as block 102, labeled “Translate request from client into standard server protocol,” clearly represents the operation of converter 65 and thus corresponds to the recited “modules,” it would appear that the Examiner is reading the abstraction layer and its “set of operations callable by ones of the set of client data exchange protocol modules” on the (undisclosed) software code that performs the operations represented by the blocks located downstream from block 102, such as block 103, which is labeled “Is request a GET MAIL request to server?” Appellants have not responded to the Examiner’s apparent reliance on the Figure 5A flowchart. Instead, Appellants argue only that

[t]he Office Action cites the server 62 and converter 65 in support of its asserted teaching of the “abstraction layer” in the Dorrance patent. By combining the server 62 and converter 65 together, the Final Office Action is, in effect, admitting that Dorrance merely discloses a single “black box” that handles requests from a client in a variety of protocols. However, there are clearly no specific teaching[s] within Dorrance of Appellants' claimed *set of client data exchange protocol modules* and a *protocol abstraction layer* (within a data access server engine) including a set of operations callable by the protocol modules.

Br. 7.

*F. Summary regarding claims 1, 10-12, 22, and 32-34*

For the reasons given above, Appellants have failed to show error in the rejection of independent claims 1 and 22 or dependent claims 10-12 and 32-34.

*G. Independent claim 44*

Claim 44 reads:

44. A method for activating a data access server through a start-up process that builds the data access server from previously installed program files including at least an executable file incorporating a data access server engine and a separate and distinct file containing one or more of a set of client application data exchange protocol modules installed on the data access server, and wherein the set of client application data exchange protocol modules invoke a set of data access operations executable by the data access server engine of the data access server according to a module-engine interface definition, the method comprising the steps of:

starting up an executable corresponding to the data access server and including the data access server engine;

loading the set of client application data exchange protocol modules thereby creating program links between at least one of the protocol modules and the data access server executable; and

instantiating a data access server object corresponding to a connection between the data access server and a requesting client application.

The Examiner reads these claim limitations (except for the recited “set” of “client application data exchange protocol modules”) on converter 65 and on the description of the Figure 5A/5B flowchart in column 6, lines 6-67, and column 7, lines 24-67. Answer 15.

Because the body of claim 44 recites the steps of “starting up an executable corresponding to the data access server . . .” and “loading the set of client application data modules thereby creating program links between at least one of the protocol modules and the data access server executable,” we agree with Appellants’ characterization of claim 44 as directed to the “dynamic creation” of a data access server (Br. 10). We also agree with Appellants that “the citations to the Dorrance and Lim patents in the rejection of claim 44 have little, if any, relevance to the recited elements of claim 44.” *Id.* (emphasis omitted). Because neither Dorrance nor Lim discloses the dynamic creation of a server, we are reversing the rejection of claim 44.

*H. Claims 2-5, 30, and 45-48*

Claims 2, 30, and 45, on which claims 3-5 and 46-48 depend, specify that the “set of client data exchange protocol modules comprise plugins.”

The Examiner found that Dorrance discloses plugins, citing column 4, lines 1-20. Answer 18. Although Appellants argue (Reply Br. 5) that the cited passage contains no teaching whatsoever concerning plugins, they have not explained how they believe “plugins” should be interpreted or cited any

authority as support for such an interpretation. We are therefore affirming the rejection of claims 2-5 and 30. However, we are reversing the rejection of claims 45-48, which depend on claim 44, as to which the rejection has been reversed.

*I. Claims 6, 31, and 49*

Each of these claims specifies that “ones of the set of client data exchange protocol modules handle data access requests from client applications in accordance with particular client data exchange protocols.” Regarding these claims, Appellants repeat their argument that Dorrance’s converter 65 is not “a set of client data exchange protocol modules,” as required by claim 1, which argument is unpersuasive for the reasons given above. The rejection of claims 6 and 31 is therefore affirmed. The rejection of claim 49 is reversed because it depends on claim 44, the rejection of which has been reversed.

*J. Claim 7*

Claim 7 depends on claim 1 and recites:

a loading mechanism for determining a presence of at least one of the set of client data exchange protocol modules upon a machine for executing the process data access server, and loading the at least one client data exchange protocol module during a startup process that integrates the at least one client data exchange module with the data access server engine.

The Examiner found, without further explanation, that this limitation is satisfied by Figure 3 of Dorrance. Answer 6. We agree with Appellants that Figure 3 does not show the claimed loading mechanism and are accordingly reversing the rejection with respect to this claim.

*K. Claims 8, 25, and 50*

These claims specify that “the set of operations of the data access server engine includes at least one operation callable by at least two distinct ones of the set of client data exchange protocol modules that incorporate distinct data exchange protocols.” Regarding these claims, Appellants repeat their argument that Dorrance’s converter 65 is not “a set of client data exchange protocol modules,” as required by claim 1, which argument is unpersuasive for the reasons given above. The rejection of claims 8 and 25 is therefore affirmed. The rejection of claim 50 is reversed because it depends on claim 44, as to which the rejection has been reversed.

*L. Claim 9*

Claim 9 specifies, *inter alia*, that “the data access server is created by a start-up process that builds the operational data access server from previously installed program files, and wherein the program files of the client data exchange protocol modules and the data access server are independently designateable with regard of one another.”

The Examiner reads this claim language on Dorrance's Figure 3 and column 6, lines 15-39. Answer 6.

We agree with Appellants that Dorrance "neither discloses nor suggests an arrangement wherein the client data exchange module and data access server comprise independently designated files" (Br. 10) and are therefore reversing the rejection of claim 9.

*M. Claims 13-21, 23, 24, 26-29, and 35-43*

Appellants argue that

[t]he rejected claims recite specific operations that are known generally in the data access server art. However, none have been incorporated into an interface supported by the recited data access server engine and callable by a variety of protocol-specific modules as recited in claims 1 and 22. None of these operations are disclosed in either Dorrance or Lim.

Br. 10. This does not amount to an argument that claims 13-21, 23, 24, 26-29, and 35-43 recite nonobvious subject matter even if independent claims 1 and 22 are not. We are therefore affirming the rejection of claims 13-21, 24, 26-29, and 35-43.

## DECISION

For the foregoing reasons, the rejection of claims 1-6, 8, and 10-43 under 35 U.S.C. § 103(a) for obviousness over Dorrance in view of Lim is affirmed, and the rejection of claims 7, 9, and 44-50 on that ground is reversed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. §§ 41.50(f) and 41.52(b).

AFFIRMED-IN-PART

Homere, *Administrative Patent Judge, dissenting-in-part.*

I agree with the majority's holding in all respects save one. I write separately to voice my disagreement with the majority's finding that the combination of Dorrance and Lim does not teach or suggest the dynamic creation of an access server as allegedly recited claims 44 through 50.

Because of this finding, the majority reverses the Examiner's prior art rejection of cited claims. From that decision, I respectfully dissent.

The majority opinion states in relevant part:

Because the body of claim 44 recites the steps of "starting up an executable corresponding to the data access server . . ." and "loading the set of client application data modules thereby creating program links between at least one of the protocol modules and the data access server executable," we agree with Appellants' characterization of claim 44 as directed to the "dynamic creation" of a data access server (Br. 10). We also agree with Appellants that "the citations to the Dorrance and Lim patents in the rejection of claim 44 have little, if any, relevance to the recited elements of claim 44." *Id.* (emphasis omitted). Because neither Dorrance nor Lim discloses the dynamic creation of a server, we are reversing the rejection of claim 44. (Maj. Op. 18.)

Appellants' Brief states in relevant part:

Claim 44 is an independent claim directed to the dynamic creation of the data access server defined in claim 1 that is neither disclosed nor even remotely suggested in Dorrance and Lim. Appellants appeal the final rejection of independent claim 44 for the reasons set forth above with regard to claim 1. Furthermore, *Appellants specifically note that the citations to the Dorrance and Lim*



*patents in the rejection of claim 44 have little, if any, relevance to the recited elements of claim 44.* Appellants request further explanation of the references to the cited prior art corresponding to claim 44's recited elements.

(App. Br. 10) (Emphasis added.)

At the outset, I would like to highlight my disagreement with the majority's finding that the Dornace-Lim combination has little relevance to the elements of claim 44. Our reviewing Court has held that Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (indicating that on appeal to the Board, an Appellant can overcome a rejection by showing insufficient evidence of *prima facie* case or by rebutting the *prima facie* case with evidence.) (citing *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

In the present appeal, the Examiner's rejection has addressed all the limitations of independent claim 44. (Ans. 14-15.) Further, the Examiner has provided a rationale for concluding that the combination of Dorrance and Lim renders claim 44 unpatentable. (*Id.*) In my view, the Examiner has consistently with the case law made a sufficient *prima facie* case of obviousness against these claims to shift the burden to Appellants.

As shown in Appellants' response reproduced hereinabove, Appellants generally allege that claim 44 is directed to the dynamic creation of an access server, and that the combination of Dorrance and Lim has little

relevance to the claim. I find such a response to be insufficient to show error in the Examiner's prima facie case of obviousness. Firstly, claim 44 does not require the creation of an access server, let alone a dynamic one. The majority's attempt to attribute such characterization to the claim simply falls short of its target. While the preamble of the claim sets forth the creation of a process for building a data access server from previously installed files, the body of the claim merely recites, however, the steps of starting up an executable corresponding to a data access server, creating program links between the access server and protocol modules, and instantiating a data objects between the access server and a requesting client. Thus, the body of the claim is not functionally tied to the invention as set forth in the preamble. I find the claim limitations to result, at best, in an interface mechanism that links a requesting client to a data access server. However, they do not in any manner, shape, or form result in the dynamic creation of an access server, as argued by Appellants. Therefore, Appellants' arguments are not commensurate in scope with the claimed invention. In my opinion, such arguments are not persuasive.

Secondly, assuming *arguendo* that the claim did require the dynamic creation of an access server, Appellants would still have to particularly explain how the language of the claim is patentably distinguishable from the combination of Dorrance and Lim. Merely asserting that the cited combination is not relevant to the claim, in my view, is not a persuasive argument. Appellants have not even attempted to compare and contrast the

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textual portions of the references relied upon with the claim limitations. Appellants are reminded that a statement that merely points out what the claim recites will not be considered as an argument for separate patentability of the claim. 37 C.F.R. § 41.37(c)(1)(vii). Appellants are further reminded that a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references does not constitute a persuasive response. 37 C.F.R. § 1.111(b). Therefore, Appellants' arguments are unpersuasive. I am thus satisfied that Appellants have not shown error in the Examiner's rejection of claims 44 through 50 as being unpatentable over the combination of Dorrance and Lim. I would consequently affirm the Examiner's rejection of these claims.

rwk

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